

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DENNIS CARVER,

Appellant,

v.

**DELTA INNOVATIVE SERVICES; AMERICAN HOME ASSURANCE CO and
TREASURER OF THE STATE OF MISSOURI - CUSTODIAN OF THE SECOND
INJURY FUND,**

Respondents.

DOCKET NUMBER WD74266 Consolidated with WD74271 and WD74296)

Date: January 29, 2013

Appeal from:
Labor and Industrial Relations Commission

Appellate Judges:
Division One: Joseph M. Ellis, P.J., James E. Welsh and Alok Ahuja, Judges

Attorneys:
Mark E. Kelly and Kristi L. Pittman, Liberty, MO, for appellant.
John D. Jurcyk, Kansas City, KS and Andrew J. Dickson, Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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Dennis Carver filed a workers' compensation claim based on an injury he suffered as a result of a workplace injury. The Labor and Industrial Commission issued a final award finding Carver to be permanently and totally disabled, and awarding compensation. The Commission reduced the financial award to Carver by 50% under § 287.120.5, RSMo, however, based on its finding that his injury had been caused by his failure to follow a safety rule of his employer.

In an earlier appeal (*see* 379 S.W.3d 865), this Court reversed the final award, to the extent that it reduced Carver's compensation. We reversed based on our conclusion that the final award did not contain sufficient factual findings to justify the reduction, and that appellate review of the merits of the reduction was not possible. We remanded the case to the Commission for the issuance of more detailed factual findings.

On remand, the Commission made additional factual findings, which suggest that it would find that the employer had failed to prove a basis for reduction of Carver's award. The Commission did not issue a new final award allowing Carver full compensation, however, because it concluded that our mandate in the earlier appeal required it only to issue new findings of fact, not to enter a new award based on those findings. Carver now asks this Court to recall the mandate of the earlier appeal, and modify our opinion to specify that the Commission must issue a new final award based on any new or additional findings that it makes.

MOTION TO RECALL AND MODIFY MANDATE DENIED.

It is unnecessary to modify our earlier mandate or opinion. On remand from an appellate court, a lower tribunal must perform all acts expressly required by the appellate court's mandate, as well as all acts required "by necessary implication." *Frost v. Liberty Mut. Ins. Co.*, 813 S.W.2d 302, 305 (Mo. banc 1991). Because we reversed that portion of the Commission's

decision which reduced Carver's workers' compensation award by 50%, and directed that the Commission make additional findings as to whether a reduction was appropriate, a necessary implication of our mandate was that the Commission issue a new final award consistent with its new factual findings. Without a new final award, the issue of whether Carver's award is subject to reduction remains unresolved; until such a new final award has been entered, the Commission has failed to fully comply with the mandate previously entered.

We trust that, with this clarification, the Commission will promptly issue a new final award consistent with its additional findings. If it does not, Carver may seek appropriate relief by writ of mandamus or otherwise, to compel the Commission to issue a final award.